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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID E. MILLER,
Petitioner,

vs.

COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTION PRESENTED

Whether the State of Minnesota may levy an unapportioned use tax against the taxpayer's farm machinery purchased in North Dakota and used in his farming operations in both North Dakota and Minnesota.

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COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

The taxpayer petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Minnesota in this case.

OPINION BELOW

The opinion of the Minnesota Tax Court entered on September 13, 1983, App. A, infra., p. A-1 is not reported. The opinion of the Minnesota Supreme Court entered on January 11, 1985, (App. B, infra., p. A-5 is reported at 359 NW2d 620 (1985).

JURISDICTION

The decision of the Minnesota Supreme Court on January 11, 1985 serves as the final order or judgment under Minnesota practice. The time for the filing a Petition of Certiorari will expire on April 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTE INVOLVED

Section 297A.14 (Minnesota Statutes Annotated) MSA, provides as follows:

> Using, storing or consuming tangible personal property; admissions; utilities.
>
> For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 was paid on said sales price.
>
> Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

STATEMENT

1. The taxpayer, David Miller, hereinafter Miller, is a lifelong resident of North Dakota and a farmer. He owns farmland both in North Dakota and Minnesota but his buildings, storage and loading facilities are located in North Dakota. (App., *infra* p. A-2) Sixty-eight per cent of Miller's farmland is located in Minnesota and thirty-two per cent is in North Dakota. (App., *infra* p. A-2).

The taxable periods involved are the calendar years 1977 through 1980. (App., *infra* p. A-2) In that space of time Miller purchased farm machinery in North Dakota at a total cost of $756,891.58. (id. at A-6) The machinery was purchased in North Dakota and sales taxes were paid at the then

North Dakota sales tax rate of 2% on the purchase price. (id. at A-6).

In 1982 Minnesota's Commissioner of Revenue audited Miller and assessed a use tax under Section 297A.14, MSA based on 4% of the retail price of that equipment less the 2% sales tax paid to North Dakota. (App., *infra* p. A-6). Miller objected and commenced an action in the Minnesota Tax Court which was the trial court under Minnesota procedure. The Minnesota Tax Court opinion upheld Minnesota's assessment of tax, finding that a nexus existed for the imposition of the tax, but apportioned the tax based upon its relative use in North Dakota and Minnesota. (App., *infra* p. A-3) Since 68% of Miller's land was located in Minnesota the Minnesota Tax Court apportioned the use tax by that percentage and further apportioned the credit allowed for sales taxes paid to North Dakota by the same percentage. (App., *infra* p. A-3).

2. Minnesota's Attorney General filed a Petition for Certiorari with the Minnesota Supreme Court. That Court reversed, holding that the tax was to be assessed against the full purchase price of the property, without apportionment, less the full amount of sales tax paid to North Dakota. (App., *infra* p. A-7) It was the position of the Minnesota Supreme Court that the Minnesota statutory scheme did not permit a proportionate reduction reflecting the measure of actual use within the state. (App., *infra* p. A-7)

REASONS FOR GRANTING THE PETITION

This is the first case before this Court which involves a commerce clause and/or due process claim seeking the *apportionment* of a *use* tax. We concede that a sales tax does not require apportionment for a purchaser has wide discretion in choosing the state (or community) within which he will purchase personal property and by selecting a jurisdiction he becomes amenable to the sales tax. Nor do we contend that a use tax may not constitutionally be levied upon farm machinery brought into Minnesota for we agree that the State of Minnesota has a connection with the use of the property sufficient to withstand any constitutional challenge. *Southern Pacific Company v. Gallagher,* 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1938). It is possible, however, that the Supreme Court of Minnesota may have overlooked a statutory requirement which, on its face, seems to exempt Miller's use. Section 297A.25, Subd. 3, MSA provides:

> All articles of tangible personal property brought into Minnesota by a person who was a non-resident of this state immediately prior to bringing such property into this state for his use, storage, or consumption are hereby exempted from the tax imposed by section 297A.14.

However, Minnesota contends that the above statutory provision does not apply to a taxpayer purchasing property intended at the time of purchase for use in Minnesota. Section 8130.4300, Minnesota Sales and Use Taxation Regulation provides:

> PROPERTY BROUGHT INTO MINNESOTA
>
> Subpart 1. General rule. Except as provided in Minnesota Statutes, section 297A.25, subdivision 3 (which exempts personal property from the tax where brought in by a nonresident just prior to becoming a resident), Minnesota Statutes, section 297A.23, casts upon any purchaser

of tangible personal property the burden of proving that items subject to the imposition of a use tax under Minnesota Statutes, section 297A.14, which were shipped or brought into Minnesota by such purchaser subsequent to July 31, 1967, were not purchased from a retailer for storage, use, or consumption in Minnesota. Whether the property has been purchased for use in Minnesota usually will be determinable at or near the time of its purchase. Thus, a nonresident purchaser who can show that property which had been purchased and previously used in another state for a reasonable period of time before being brought into Minnesota for use therein, usually will be deemed to have satisfied the requirements of Minnesota Statutes, section 297A.23.

Example 1. A contractor with his principal place of business in Wisconsin is engaged to construct a portion of an interstate highway in Minnesota. In order to perform the work, he brings into Minnesota various pieces of heavy equipment previously purchased and used in his road building activities in other states.

The contractor's records substantiate the previous purchase and use of this equipment outside Minnesota. Accordingly, no use tax is due.

Example 2. Same facts as in example 1 except that the contractor purchases three additional pieces of equipment necessary for the Minnesota job and has such equipment delivered into this state. Consequently, the presumption that the three additional pieces of equipment were purchased for initial use in Minnesota cannot be overcome by contractor.

Subp. 2. Credit for tax paid to other state. Whether a use tax is due and payable to Minnesota depends upon whether a tax has been paid to some other state. Such credit is limited to sales or use tax paid to any other state of

> the United States. In this connection see Minnesota Statutes, section 297A.24.

This Court has held that taxes burdening interstate commerce are subject to apportionment. It is beyond question that income taxes on multistate operations must be apportioned. *Hans Rees' Sons, Inc. v. North Carolina Ex Rel. Maxwell,* 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931); *Moorman Manufacturing Co. v. Bair,* 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed. 2d 197 (1978).

In a case dealing with personal property taxes this Court stated in *Japan Line, Limited v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed. 2d 336 (1979); (p. 444, 5)

> ***If the state tax 'is applied to an activity with a substantial nexus with the taxing State, is *fairly apportioned,* does not discriminate against interstate commerce, and is fairly related to the services provided by the State,' no impermissable burden on interstate commerce will be found.*** (Emphasis supplied)

See also *Norfolk and Western Railway Co. v. Missouri State Tax Commissioner,* 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed. 2d 1201 (1968) which found that Missouri's property tax on railroad rolling stock was improperly apportioned.

We believe this case is important for it appears to be the first attempt by a state to reject a requirement of apportionment of a use tax under conditions which clearly burden interstate commerce. The taxpayer, a farmer, is undoubtedly engaged in interstate commerce; he farms in two states and his produce largely, if not entirely, joins the mainstream of interstate (and foreign) commerce. *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

The previous litigation in this general area has been concerned with the "nexus" problem rather than the more logical issue of apportionment but the problem and its magnitude are expressed

in that line of cases. For example in *Skelton v. Federal Express Corp.,* 531 SW.2d 941 (Ark. 1976) the taxpayer transported eighteen jet aircraft into Arkansas for a period of approximately fifty days for modification prior to being used in the taxpayer's air carrier operations. They were not placed in service in the state. Arkansas sought to impose a use tax and its Supreme Court upheld it, finding that the aircraft had come to rest in Arkansas and was subject to taxation at that point.

In *Matter of Atlantic Gulf & Pacific Co. v. Gerosa,* 16 N.Y.2d 1, 261 N.Y.S.2d 32, 209 N.E. 2d 86 (1965), the Court upheld the application of New York City's use tax on dredging equipment purchased and used out of state for eight years and then brought into the city for dredging contracts in the city harbor waters which took only about six weeks to complete. On the other hand the Iowa Supreme Court, in *Morrison-Knudson Co., Inc. v. State Tax Commissioner,* 242 Iowa 33, 44 NW2d 449 (1950) construed the Iowa use tax statutes to forbid the imposition of the use tax upon construction equipment which had been used for an extensive period of time in states other than Iowa.

In such cases, as here, the taxing state is imposing its tax on "use" in other states. Here Minnesota is taxing Miller's use in North Dakota since 32% of its use occurs there. Obviously the tax under examination is extraterritorial and that extraterritorial effect (and duplicate taxation) is the mischief this Court has held is forbidden by the commerce clause in other areas of state taxation, absent fair apportionment. As this Court stated in *Norfolk and Western Railway Co. v. Missouri State Tax Commission, supra,* (p. 325):

> ***The taxation of property not located in the taxing state is constitutionally invalid, both because it imposes an illigitimate restraint on interstate commerce and because it denies the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the pecularities of a given

> enterprise to "project the taxing power of the state plainly beyond its borders." *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 365 (1940). Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. *Fargo v. Hart,* 193 U.S. 490, 499-500 (1904).***

In a footnote in that opinion this Court stated: (p. 325)

> We have said: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' (Citation omitted) So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. (Citation omitted) *Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.*"*** (Emphasis supplied)

While it is true that the use tax is generally intended to be a supplement to the sales tax, the use tax's effect (unlike a tax on sales) is precisely the same as a tax on railroad rolling stock such as involved in *Norfolk & Western Railway Co., supra.* There a personal property tax levied on a mileage basis was held to be discriminatory, violating the due process clause and the commerce clause. Here the tax on use has no apportionment in any form whatsoever.

As we point out above Minnesota has effectively taxed Miller on 32% of his use of the property occurring outside the State of Minnesota. While the Minnesota Supreme Court was correct that Miller's farm machinery had a nexus for taxation, we must realize that an unapportioned use tax levied upon the full purchase price of property imposes potentially enormous burdens upon interstate commerce. These considerations reach far beyond the facts in this case. For example the Minnesota use tax would be applicable if the decision in this case is upheld in the following situations:

1. The undersigned (or a member of this Court) travels to St. Paul, Minnesota on business. He carries his briefcase which was purchased for use in all states in which he performs his trade or profession. That briefcase is subject to use tax in Minnesota at the full purchase price, although it may have been purchased years before.

2. The Washington Redskins travel to Hubert Humphrey Stadium in Minneapolis to play the Minnesota Vikings. The State of Minnesota may collect a use tax on the Redskins' equipment, footballs, tackling dummies and all other football paraphernalia.

3. An individual operates a small business as an electrician in North Dakota. When purchasing tools he realizes he may provide services in Minnesota. He receives a call to repair a light switch in Minnesota and drives his truck into that state. As he crosses the border he becomes liable for Minnesota's use tax on the original purchase price of all of his tools and his truck as well. Indeed Minnesota law does not seem to exempt any vehicle entering the state so presumably every trucker, every bus, and most motor vehicles passing through Minnesota could become subject to the use tax.

4. The IBM Corporation owns a corporate jet that cost $1,000,000; it was purchased to transport executives to its offices around the United States. The plane is flown from the home office in New York to Rochester, Minnesota, the location of a branch office, for a business conference. When the jet enters Minnesota airspace IBM becomes liable for the current 6% use tax, a $60,000 use tax on a $1,000,000 purchase.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MINNESOTA — TAX COURT

COUNTY OF WILKIN — REGULAR DIVISION

David E. Miller,
Appellant,

v.

The Commissioner of Revenue,
Appellee.

Docket No. 3665

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND MEMORANDUM

(Order dated: Sept. 13, 1983)

This is an appeal from an Order of the Commissioner of Revenue dated August 6, 1982, assessing a use tax against the Appellant, who is a resident of North Dakota, for the use of farm machinery on lands owned or rented by the Appellant in Minnesota.

The matter came on for trial at the Wilkin County Courthouse at Breckenridge, Minnesota, on December 14, 1982, before the Honorable John Knapp, Chief Judge of the Minnesota Tax Court.

R. E. T. Smith, Esquire, of the firm of Smith and Strege of Wahpeton, North Dakota, appeared as counsel for the Appellant; and C. H. Luther, Deputy Attorney General, appeared as counsel for Appellee.

At issue is the amount of use tax due on items of tangible personal property purchased by the Appellant in North Dakota for use in Minnesota on which a sales tax was paid in North Dakota at a lower rate than that payable in Minnesota.

From the evidence adduced at trial and from the files and records herein the Court makes the following:

FINDINGS OF FACT

1. Appellant is a resident of the State of North Dakota and maintains a farm together with a grain elevator in Richland County, North Dakota. He owns 3,628 acres in North Dakota and in 1977 owned 7,656.5 acres in Minnesota and during each of calendar years 1978, 1979 and 1980, he owned 7,736.5 acres in Minnesota. It is conceded by the Appellee that this amounts to approximately 68% during the years here in issue.

2. During calendar years 1977, 1978, 1979 and 1980, the Appellant purchased farm machinery totaling $765,891.58 in the State of North Dakota on which he paid a 2% sales tax as required by North Dakota law. Appellant purchased the machinery for use on both his Minnesota and North Dakota farm land. Appellant's use of farm machinery in Minnesota was in direct proportion to the lands farmed in Minnesota, which is conceded to be 68%.

3. Appellant is not engaged in Interstate Commerce as contended by him.

4. By his Order dated August 6, 1982, the Commissioner of Revenue assessed a use tax on the retail purchase price of all of said farm machinery. Credit was given pursuant to Minn. Stat. § 297A.24 for the 2% sales tax paid to North Dakota.

5. Seven of the items of farm machinery purchased by the Appellant during the years in issue were never brought to the State of Minnesota and never used in Minnesota. The total cost of those items was $64,913.50 on which a use tax in the amount of $1,416.27 was assessed.

CONCLUSIONS OF LAW

1. No use tax can be assessed on items of personal property purchased by the Appellant in North Dakota which were never physically brought to the State of Minnesota so the Appellant is entitled to a deduction of $1,416.27 for those items.

2. The amount of use tax shall be recomputed as follows:

   a. Assessing a use tax of 68% of 4% of the purchase price of all items of farm machinery which were used within the State of Minnesota (no use tax shall be assessed on those items which were never physically present in the State of Minnesota).

   b. A credit of 68% of the tax paid to the State of North Dakota on those items which were used within the State of Minnesota shall be subtracted.

   c. Interest at the statutory rate shall be added to the date of payment.

   d. No penalty shall be assessed.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 15 DAYS IS HEREBY ORDERED.

BY THE COURT
John Knapp, Chief Judge
Minnesota Tax Court

Dated: September 13, 1983

MEMORANDUM

The Appellant claims that he is engaged in Interstate Commerce because he is shipping wheat to Minneapolis, corn to Canada, and sunflowers to other jurisdictions through Cargill, Inc. as intermediary. All of the goods shipped in Interstate Commerce are farm produce. Appellant claims that a tax on the machinery used to prepare the goods for Interstate Commerce is an unconstitutional burden on the flow of commerce and is thus

prohibited. We cannot agree with that contention. The imposition of a use tax on the Appellant is no greater an impediment to Interstate Commerce than is the imposition of a sales tax on machinery purchased by a farmer who resides in the State of Minnesota and also produces grain which is ultimately shipped in Interstate Commerce.

The fact that the tax is a tax imposed by the State of Minnesota and is called a "use tax" implies that it is to be imposed upon a use in Minnesota of personal property purchased elsewhere. It is not a tax on the use in North Dakota so no use tax can be imposed on those items of machinery that were never used in Minnesota.

Because the farm machinery was used both in Minnesota and North Dakota, it seems consistent with the basic principles of our sales and use tax laws and the economic realties of the transactions in this case to make a pro rata assessment of the use tax as was done by the Minnesota Supreme Court in *Commissioner of Revenue v. Safeco Products Co.*, 266 N.W. 2d 875. In that case the Court held that the sales and use tax exemption for purchase of property ultimately destined for out-of-state use was available for the same proportion of component costs not otherwise included in the finished-product charge, as the finished product itself. Consistent with that decision, it seems appropriate that the Appellant should pay 68% of the use tax for those items that ultimately reached Minnesota and were used in Minnesota and should be given credit for 68% of the tax paid to the State of North Dakota on those items.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

C5-83-1515

Tax Court — Yetka, J.

David E. Miller,
Respondent,

v.

Commissioner of Revenue,
Relator.

Endorsed
Filed January 11, 1985
Wayne Tschimperle
Clerk of Appellate Courts

SYLLABUS

1. Liability for use tax, Minn. Stat. §§ 297A.14, 297A.24, must be measured in accordance with the statutory formula, and no pro rata reduction may be made to reflect the proportion that in-state use bears to total use.

2. Imposing full use tax liability for any use in Minnesota of property purchased out of state does not impermissibly burden interstate commerce.

Affirmed in part; reversed in part.

Considered and decided by the court en banc without oral argument.

OPINION

YETKA, Justice.

Relator Commissioner of Revenue seeks review by certiorari of a decision of the Tax Court determining that the taxpayer was liable for use tax on machinery purchased in North Dakota and used in Minnesota, but reducing the amount of the commissioner's assessment. The taxpayer, David E. Miller, by notice of review, also challenges that determination. We affirm in part and reverse in part.

The taxpayer is a North Dakota resident who owns and farms land straddling the border of Minnesota and North Dakota; approximately 68 percent of his land lies in Minnesota. Between 1977 and 1980, Miller purchased farm machinery from a North Dakota retailer worth $756,891.58. He paid a 2 percent North Dakota sales tax on each purchase. Seven pieces of machinery purchased in North Dakota were never brought into Minnesota. Miller estimated that the remaining equipment was used 68 percent in this state, in direct proportion to the percentage of his total acreage which lies within Minnesota.

In 1982, the Commissioner of Revenue assessed Miller $38,282.23 for delinquent use tax, penalties and interest based on the total purchase price of all the equipment, subject to a credit for North Dakota sales tax paid. On Miller's appeal, the Tax Court substantially reduced the amount of the assessment, excluding the amount attributable to property never used in Minnesota and disallowing the penalty assessment. The commissioner does not contest those reductions. However, at issue is the court's recomputation of Miller's liability for property used part time in this state. The court allowed a pro rata reduction in use tax liability and a credit for sales tax paid to reflect the estimated proportional in-state use of the equipment and therefore assessed a 4 percent use tax on only 68 percent of the purchase price and credited only 68 percent of the 2 percent sales tax paid to North Dakota on those items. The com-

missoner contends on appeal that the court was without statutory authority to order pro rata reductions to reflect the measure of actual use within this state. We agree and reverse that portion of the Tax Court's decision.

Liability for use tax is triggered by any exercise of "the privilege of using, storing or consuming in Minnesota tangible personal property," Minn. Stat. § 297A.14 (1980), and, for the subject tax years, is imposed at "the rate of four percent of the purchase price." *Id.* Credit for sales tax paid to another state is "measured by the difference between the rate herein fixed and the rate by which the previous tax was computed." Minn. Stat. § 297A.24 (1980). These provisions contain no express authorization for the pro rata reduction afforded this taxpayer and the recomputation by the Tax Court may only be sustained if it may be determined that the legislature intended the term "using" to mean that liability may only be imposed to the extent of actual in-state use of the property.

While we have never construed the term in this context, courts of other jurisdictions have consistently held that any "exercise of a right or power incidental to ownership" within the state constitutes a use sufficient to impose full use tax liability, *e.g., Woods v. M.J. Kelley Co.,* 592 S.W.2d 567, 571 (Tenn.), *cert. denied,* 447 U.S. 905 (1980); *Louisville Title Agency v. Kosydar,* 43 Ohio St. 2d 109, 330 N.E.2d 899 (Ohio 1975); *Union Oil Co. v. State Bd. of Equalization,* 34 Cal. Rptr. 872, 386 P.2d 496 (1963), *appeal dismissed,* 377 U.S. 404 (1964), even when the property is located and used within the state for only brief periods of the year. *Louisville Title Agency,* 43 Ohio St. 2d 109, 330 N.E.2d 899 (property within state for 1 month); *Randall v. Norberg,* 403 A.2d 240 (R.I. 1979) (yacht brought within state periodically for repairs, maintenance, supplies, and brief social visits); *Stetson v. Sullivan,* 152 Conn. 649, 211 A.2d 685 (1965) (yacht brought within state for 1 month). As the *Stetson* court noted in construing statutory language identical to the Minnesota provision, "[e]ven a very brief and limited use

* * * is sufficient to justify the imposition of the tax." *Id.* at 687. Not only is this reasoning persuasive, but this construction also comports with the purpose for which use tax is imposed. By complementing the sale tax, the use tax eliminates incentive to make major purchases in states with a lower sales tax. *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue,* 460 U.S. 575, ____, 103 S. Ct. 1365, 1370 (1983). This purpose would be substantially frustrated if the allocation formula adopted by the Tax Court were allowed to stand.

The Tax Court relied on this court's decision in *Commissioner of Revenue v. Safco Products Co.,* 266 N.W.2d 875 (Minn. 1978), for its result. In *Safco,* this court held that a sales tax exemption for property ultimately destined for out-of-state use was available in the same proportion for certain component costs. In that case, since 97.7 percent of the company's product was mailed to out-of-state customers, the court permitted the exemption to apply to 97.7 percent of component costs as well. The rule in *Safco* could plausibly apply in determining liability for use tax if, for example, property was purchased in a lot with only a portion of the property actually being used within the state. This is not such a case, however, because all of the property at issue here was used in Minnesota. Thus, the Tax Court's reliance on *Safco* was misplaced.

The taxpayer's challenge is that, unless the pro rata reduction is affirmed, the tax, as applied to him, places an impermissible burden on interstate commerce and is constitutionally infirm. However, liability for use tax, as measured by this court and by courts of other jurisdictions, has long been upheld by the United States Supreme Court against commerce clause attack since such liability only equalizes the positions of in-state and out-of-state purchasers. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937); *see also Maryland v. Louisiana,* 451 U.S. 725 (1981) (use taxes "equalizing" or "compensating" taxes redressing *intrastate* burden placed on in-state purchasers and manufacturers by sales tax). Moreover, we are persuaded that

the constitutional standards for state taxation of interstate commerce set forth in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) *reh'g denied,* 430 U.S. 976 (1977); do not alter this result.

Affirmed in part, reversed in part.